IMT Nuremberg Archives

H – 74

International Court of Justice

H0074-0002

Official transcript of the International Military Tribunal in the matter of The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering et al, Defendants, sitting at Nurnberg, Germany, on 2 March 1946, 1000-1300, Lord Justice Lawrence presiding.

GENERAL RUDENKO (Counsel for the USSR): May it please your Honors: please allow me to make a few supplementary remarks concerning the criminal organizations, a problem with which the Tribunal has occupied itself during the past days.

I consider it necessary, first of all, to clarify the legal aspect of this problem.

There are no indications in the Charter of the Tribunal which would state that the criminality of the organizations would automatically entail the bringing to trial, and, all the more, the condemnation of all the members of these organizations. On the contrary, the Charter contains a definite indication of a contrary character.

Article 10 of the Charter states, as has often been mentioned at this trial, that the national courts have the right, but are not obliged, to bring to trial members of the organizations which are considered criminal. Consequently, the question of the problem of the trial and of the punishment of different members, single members, of criminal organizations depends exclusively on the national courts.

The legal sovereignty of every country that has adopted the Charter of the Tribunal is limited only in one regard: the national courts cannot deny the criminal character of the organization when this criminal character has been admitted by the Tribunal. There are no further limitation on the legal sovereignty of the contracting parties.

With full reason, Justice Jackson stated here that the admission of the criminality of an organization would not automatically entail the mass condemnation of all the members of this organization. That is simply fantastic. And I would like to add that this remark is based, not on a legal foundation, but on something quite different.

A legal problem is also based on a misunderstanding. One of the Couns

H0074-0003

for the Defense, Dr. Servatius, was speaking of the legislative authority of the Tribunal. The authority of the International Military Tribunal, organized by four states to defend the interests of all freedom-loving peoples, is enormous, but this Tribunal, as a legal organism, does not possess any legislative authority and cannot possess this legislative authority.

While solving the problem of the criminality of organizations, the Tribunal is only utilizing the right which has been entrusted to it by the Charter -- to solve independently the question of the criminality of the organizations.

Of course, the verdict of this Tribunal, when coming into force, acquires the importance of a law, but that is the quality of every verdict.

The Counsel for the Defense, Kubuschok, stated here that the decisions of the Charter regarding the criminal organizations are legal innovations. In a certain sense this is true. The innovation consists, first of all, in the fact of the creation of this International Military Tribunal. Another innovation is the Charter and all its articles. But if the Defense Counsel considers it possible to deplore this fact, I would think that it would be quite opportune to remind them of the causes of these legal innovations.

The terrible crimes which were committed by the Defendants and by their associates are unprecedented in the history of mankind. These crimes provoked the necessity to discover new legal measures, in order to defend the world liberty and the lives of peoples against future crimes. Moreover, the powers which created the Tribunal, and all peace-loving peoples, remain true to the ideals of law and of the principles of justice. Therefore, the responsibility for participation in criminal organizations will only be established when personal guilt has been established. National courts will decide the concrete problems of indiyidual responsibility

Now I would like to say a few words on the practical side of this problem. It was stated here that several organizations of the SS did not follow criminal objectives. It is difficult to find neutral organizations in this mechanism. Thus, the Defense Counsel for the SS, Dr. Babel, mentioned scientific dog trainers created by the SS. One must consider that this was an organization with public utility. It appears that the scientific dog trainers

H0074 - 0004

taught the dogs to attack people and to tear to pieces the victims. Do you think we can siolate these dog trainers?

In Danzig, another scientific institution studied the prpparation of soap out of human fat. Maybe we should also isolate these soap producers.

Two practical proposals were made by the Defense Counsel: to isolate the case of the criminal organizations and to seek evidence in the various camps. However, practically, these proposals will create insoluble difficultie for the Tribunal.

The task of the Tribunal is precisely formulated in the Charter, which entrusts the Tribunal with the task of solving the problem of the criminal organizations, together with the problem of the participation of the individual members of these organizations. Therefore, an appeal to the Tribunal to isolate the case of the criminal organizations would be an infraction of the articles of the Charter.

Article 9 of the Charter states that the Tribunal will decide the case of the criminal organizations, together with the case of the individual members of these organizations. It shows that the presence in the dock of one members of this organization suffices to bring to trial this organization. As we know, all the organizations which the Prosecution proposes to call criminal are represented in the dock. There is evidence in this case which amply suffices in order to admit the criminal character of these organizations. Therefore, the calling of

H0074 - 0005

special witnesses, capable of giving evidence on these organizations, can be only a supplementary source of evidence. I am drawing these matters to a close, your Honors, and I cannot forget the further argument of the Defense. It was stated here that, as a result of the admission of the criminality of these organizations, millions of German members of these organizations would be brought to trial. Together with my colleagues of the Prosecution, I am not of this opinion, but I would like to add another point.

The Defense Counsel is simply attempting by this reference to hypothetical millions to create confusion at this time. However, before the representatives of the peoples who suffered from the struggle against Hitlerite aggression appear other millions, all those millions of innocent victims who were slaughtered in Treblinka, Auschwitz, Dachau, Buchenwald, Maidanek, and at Kiev. It is our duty to spare no effort in order to crush the criminal system which was directed by the fascist organizations against mankind.

Your Honors, the crimes perpetrated by the Hitlerites are boundless, but we are not blinded by a desire of vengeance, and we have no intention of causing repression to fall on all the German people. However, justice will not allow us to turn away from our direct task, in order to prevent a recurrence of fresh crimes.

We are quite convinced that the Tribunal will follow its course towards a rapid and just verdict.

THE TRIBUNAL (Mr. Biddle): General Rudenko, may I ask you a few questions? General Rudenko, you remember that Mr. Justice Jackson suggested certain tests that we should use before we found an organization criminal, whether the tasks and the purposes of the organization were open and notorious, in order to show that the members knew what they were doing.

Now, if we find that any organization is criminal we would necessarily find, I presume, on that test, that it s actions were open and notorious. Now, if a member of that organization found to be criminal were then tried by one of the national courts, I suppose under that finding he would not have any right to show that he did not know about it, because we would have found that the knowledge was so open and notorious that he must have known,

so he could not raise as a defense that he had no knowledge of the criminal acts, could he?

GENERAL RUDENKO: That is quite right. Considering the cases of individual members of organizations, the national courts would base themselves on this test. It is evident that it is not excluded that, for instance, in an organization of the SA which had knowledge of the criminal objects there were perhaps single members of the organization who were cheated and who, for this obvious reason, had no knowledge of the criminal designs of this organization. That is why the national courts must consider the cases of these individual members of the organizations.

THE TRIBUNAL (Mr. Biddle): But that would not be any defense to him, would it? He could not say he had no knowledge, because we would have already found that the knowledge was so open and notorious that he must have known.

GENERAL RUDENKO: I consider that if the national courts take up the case of a member of an organization who would allege that he had no knowledge, the national court must consider these arguments of the defendant.

THE TRIBUNAL (Mr. Biddle): How could they consider that if we make a rule that the activities of the organization are so notorious that he must have known? How can he then say he didn't know?

GENERAL RUDENKO: I consider, and I thus interpret the Charter, that the judgment of the Tribunal should decide the case of the criminal character of the organizations, but the question of individual responsibility and guilt of every member of this organization is a decision for which only the national courts are competent, and it is therefore difficult to foresee all the individual possibilities and eventual cases which could arise in the members of the organizations.

We were speaking of a member of the SA who entered in 1921 and left in 1922. That is an individual case. I do not know how many similar cases would arise, but it is difficult to say now the reasons for his entering that organization or the reason for his resignation, and that is why only national courts can solve these problems.

HO074 - 0006

MR. BIDDLE: Can you say now what defenses he would have before the national court except the defense that he was never a member? Does he have any other defenses so far as we know? Does Law No. 10 permit him any other defenses?

GENERAL RUDENKO: It would be rather difficult for me to say now what defensive arguments there might be, but I believe that certainly there will be, for instance, the argument of coercion, which is a sufficient argument to acquit a member of the organization.

MR. BIDDLE: May I ask you two more questions.

You used the expression that any evidence given by the defendants would be merely supplementary. That expression is not known to our law, and I would be very interested in your telling us what you meant by supplementary evidence. I do not know what the term means.

GENERAL RUDENKO: It may be an error of translation. Speaking of the further investigation of the criminal character of the organizations, I said that this case should be considered together with the case of every single member of this organization, and in this case, together with the case of the defendants in the dock. But I consider that the evidence which has been stated here is already sufficient evidence of the criminality of this organization. If the Court considers that this evidence is not adequate, then it can demand further evidence, and that is why there can be supplementary sources of evidence, especially on the case of the criminality of these organizations or the non-criminality of these organizations.

MR. BIDDLE: One other question on the SA, which I asked Sir David yesterday.

What do you consider was the function of the SA after the Roehm Purge, or, to put it a little differently, what criminal act do you believe the SA was engaged in?

GENERAL RUDENKO: I consider that after the Roehm incident, the SA committed the same criminal acts as the other organizations of the Party. In confirmation of this, I would like to refer to the fact of the seizure of the Sudeten District. As we know, the SA played a very active part in this seizure. As to all subsequent events in Germany as regards the Jews or other territories of the occupied countries, Czechoslovakia and other countries, the SA participated in the commission of these crimes.

H0074-0007

MR. BIDDLE: Thank you.

THE PRESIDENT: Does the Prosecutor for the French Republic wish to say anything?

PROSECUTOR FOR THE FRENCH REPUBLIC: No.

DR. DIX (Counsel for the defendant Schacht): I have, as counsel for the defendant Schacht, an indirect interest in the question of discriminati against the group Reichsregierung, because Schacht was a member of the Reichsregierung. I want to point out, however, at the beginning, that I wil not speak in detail, neither with legal remarks nor factual remarks. I shall do that during my last presentation.

What I want to ask now, and in which I would ask for the support of the Tribunal, is the clarification and intensification of these answers which Justice Jackson and Sir David Maxwell-Fyfe gave yesterday to your questions, Mr. Biddle.

I would like to point out that it is, of course, clear to me that I have no right to ask any questions of the members of the Prosecution, formally speaking. I can only ask the Tribunal to supplement the questions which were put yesterday bythe Tribunal. I believe, however, that this formalistic objection has no practical meaning, because I am convinced that Sir David, who can check the seriousness of my request, will be prepared, disregarding the theoretical question if he has to do so, to supplement the answers to the questions put by Mr. Biddle.

Sir David Maxwell-Fyfe was asked yesterday whether he considers the Reichsregierung, that is to say the Reichscabinet, as it was on the 30th of January 1933, in consideration of the relatively small number of National Socialists which at that time were a part of it, also criminal, and also whether he is of the opinion that this hypothetically criminal character at that time was discernable to other people.

Sir David answered this question by Mr. Biddle with "Yes" and pointed out first, the contents of the Party program, and second, the fact that already at that time the Fuehrer Principle was incorporated in the program.

I would like to ask if Sir David would kindly supplement his answers in this direction. Does Sir David really want to say that the Fuehrer Principle as such, that is to say viewed in abstraction, was not only to be

H0074-0008

rejected politically or for other reasons, but also to be considered criminal and therefore to be rejected? I want to make it understood that I am speaking about the abstract principle, without considering any factual developments in the course of time.

Concerning his second answer, that is to say the Party program, there is the question of whether one could consider the Reichsregierung as criminal already at that time, and whether this was discernable.

Sir David -- not immediately after the first question of Mr. Biddle, but later on in answering questions -- supplemented his answer and substantiated it in that he said that the aims expressed in the Party program, of eliminating the Treaty of Versailles, and the declaration of desire of the Anschluss, the annexation of Austria, were the criminal points in the program.

May I ask Sir David to explain whether these two points of the Party program, that is to say the Treaty of Versailles and the Anschluss of Austria -- and I will except the Fuehrer Principle here -- were the only points of the Party program which caused him to consider that program as such as criminal, or to consider as criminal a government which knew that program. Secondly, I would like to ask whether indeed he is of the opinion that a government which tried peacefully to bring about a revision or relinquishing of a treaty which was considered harmful to the nation, could be considered criminal if it desired to do this in peaceful ways, with peaceful means.

Furthermore, I should like to ask him to explain whether, considering the broad democratic principle of the right for self government of the people, and with regard to the actual movement in Austria itself -- and I may remind him of the plebiscite of 1938 where one can there was practically a 100 per cent majority of the Austrian population in favor of the Anschluss -- he would consider the aim and purpose to reach this end in a peaceful way a criminal point in a party program.

H0074 -0009

H0074 - 0010

Here I should like to say, in order not to be misunderstood -- I should like to underline it again and again -- that the further development and everything which actually happened and anything which might not have happened in the sense of the Party program, to which I cannot say anything, should not be considered, but the Party program as such. That, of course, was the sense of the answer when he said yesterday the Party program basis was of a criminal character.

Now, finally, to come to the end, in a logical concept of my statement it would be correct, together with the question for which I would like Sir David to give me an answer or Mr. Justice Jackson, who is not here today, together with that it would be right probably to wait until Sir David has decided --

THE PRESIDENT: (Interposing) Dr. Dix, the Tribunal will of course consider anything that you have said insofar as it refers to matters of principle, but they don't think that this is the proper time for counsel for the Defense to pose questions to counsel for the Prosecution. The matter has already been fully dealt with, and the Tribunal don't propose to ask any further questions of the Prosecution unless the Prosecution wish to say anything in answer to what you have to say.

DR. DIX: Your Lordship, that was what I took the liberty to say in the beginning, that it would be the free will and the free decision of the Prosecution whether it desired the Tribunal to admit any answers to the questions which I put. That I would leave to you, gentlemen.

I only have a short question, which serves the purpose that we may understand each other. It is always important not to be misunderstood.

I remember quite well -- but I may be mistaken, and that is why I wish to ask Sir David -- that Mr. Justice Jackson, as far as he was concerned, mentioned that he did not consider the Party program as such as criminal. As I have said, this is what I remember. I have not taken any notes on that, because I did not take any particular notice of it at that time. I thought that was understood, and I may be mistaken. But if my memory is correct, I should like to ask Sir David to speak about this question also, whether there exists another attitude on the side of the Prosecution on this point.

H0074 -0011

THE PRESIDENT: Dr. Dix, the Tribunal asked the Prosecution to present their arguments in principle on the question of these organizations, and they wished also to hear counsel for the organizations in order that these matters should be cleared up, with a view to any possible evidence which might have to be given. They have heard counsel for all four Prosecutors. They have asked them questions which they thought it was right to ask them in order to clear up any points. They haveheard counsel for all the organizations, and they have heard counsel for the Prosecution in reply. They do not propose to ask any further questions of the Prosecution at this stage. Of course counsel for the Prosecution and counsel for the Defense will be fully heard at a later stage.

DR. DIX: I have come to the end of my statement. I leave it to the Court and Sir David whether they want to answer these questions, now.

DR. SEIDL (Counsel for Defendant Frank): Mr. President, I would like to make a short statement concerning the question of which of the organizations on the Indictment the Defendant Frank was a member. Is this possible at this moment?

THE PRESIDENT: Dr. Seidl, the Tribunal does not think this is an appropriate time for any of the counsel for individual defendants to go into matters connected with the charges against the organizations. They will, of course, be heard in the course of their own defense, but this is not the appropriate time. This is only a preliminary discussion for the purpose of clarifying the issues which relate to the organizations.

DR. SEIDL: Yes, sir, but I should like at this time only to clarify a mistake which apparently has occurred day before yesterday. Day before yesterday I protested against the statement that the Defendant Frank was a member of the SS. I am afraid that has been translated wrongly, has been mistranslated.

THE PRESIDENT: Dr. Seidl, won't it appear in the short hand notes? You haven't seen the shorthand notes yet?

DR. SEIDL: I have not seen the transcript yet, but I believe that by error it was mistranslated. The Defendant Frank has never denied that he was SA Obergruppenfuehrer. What I would like to point out is only that, as said in the Indictment, he was SS General, that that was not true.

H0074 - 0012

Also, that the statement in Annex B about the criminal element is not correct because it is said there that he had been SS General. I would like to point out and underline thatthe Defendant Frank has never demied that he was SA Obergruppenfuehrer.

THE PRESIDENT: Very well, but you will have an opportunity to develop the whole case of Frank when your turn comes.

DR. SEIDL: Yes, sir, but the question is this: Whether he has to prove whether the Defendant Frank was a member of the SS or whether he was not. So long as the Prosecution does not present any definite proof of the membership of the Defendant Frank in the SS, so long do I have to object to this statement. I do not believe that it is the job of the Defense to prove that the Defendant Frank was not a member of the SS. I am convinced that, on the other hand, this is one of the jobs of the Prosecution.

THE PRESIDENT: Very well; I have heard what you said.

DR. SERVATIUS: Dr. Servatius, for the Leadership Corps --

THE PRESIDENT: Dr. Servatius, the Tribunal is prepared to hear counsel for the organizations very shortly in the rebuttal, but only very shortly. Otherwise we may go on interminably.

H0074 - 0013

DR. SERVATIUS: I would like to present a brief and only for about five minutes, I would like to state something about the proof, matters of proof. First, I should like to ask two questions concerning the limitation of the number of people. I would be grateful if the Prosecution could make a statement whether the separation of certain parts of the organization is a final one or whether the other aspects are reserved, such as it has been declared originally about the political leadership, the Leadership Corps. Concerning the limiting of the number of persons, I do not wish to make any further motior as far as that limitation has already been affected. I should be glad however, concerning the female membership, if a decision could be taken, and that now national officers, or the female experts who were employed in the offices could not be, in my opinion, could not be included in the staff. At any rate, they do not belong to the Leadership Corps, the political Leadership Corps, although they worked with the staffs. These women themselves are of the opinion I am of the opinion, and also the offices of the camps are of this opinion -- and there has not been a single application for a legal hearing made by any of these women.

I presume it is known that the women in the National Socialist State, as a matter of principle, were kept away from politics, and, therefore, they can hardly be charged with the crimes mentioned in Article 6 or brought in any connection with them.

Now, I wuld like to speak about two points concerning evidence. As every profession creates tools, so the jurists create definitions to solve their tasks. These definitions are not created for themselves but, for instance, the definition of a criminal organization should serve to bring guilty ones to tria who would otherwise possibly escape of this responsibility. In establishing the Charter the precedure was this, that one has developed the structure of the state in order to reach the individual organs. In order to be able to seize these organs, one has written altogether under the definition of conspiracy. In this way, a relatively small circle could be included, since, through agreement these members have to be connected with each other in the definition of conspiracy. In order to increase this purpose in the way of juridical -

H0074-0014

technique, the criminal group or organization has been created or named. This organization is connected only at its head, with the agreement of the conspirators, while the members automatically, without their own knowledge, are included in the conspiracy. A definition of this kind of criminal organization is right only so far as it can be used to determine the guilty ones and only the guilty ones.

For the limitation of that definition, to limit that definition, I would like to speak about two points concerning the determination of guilt and therefore relevant for the question of admissibility of proof. First, there is the question of lack of knowledge by the members of the criminality: the lack of knowledge was possible on the basis of secrecy on the plans and then the attitude of the members after they had realized such faults. In my opinion, the examination about the guilt could not be stated by pointing at the knowledge of foreign countries about the real conditions. In foreign countries, propaganda may have exaggerated facts. In Germany all these facts were kept secret; first, because of their nature, they had to be kept secret, such as things going on in the extermination camps or because, for political reasons, they had to be kept secret. Besides, the things which we know today, the facts were so improbable, unreal, that even in Germany they could not be believed during the war. It must be relevant to determine not whether the single individual member had no knowledge, but, that, in fact, ninety-nine percent of the individual members acted bona fide. In this case, not all the organization is criminal, but there can be and there may have been a criminality. If this is determined, then the legal construction of the criminal organization is unnecessary and therefore false. Our ideas and principles of law so far will b sufficient to bring the guilty to trial.

The next point. The criminal nature or the criminal character of which the Charter speaks, which the Charter mentions, shows that that must be something which concerns the entire organization and that it must be a condition of duration, of a certain duration. Individual acts which were rejected as mistakes by the organization or the great majority of its members, could not be considered as determining the criminal character of the organization. The

H0074 - 0015

attitude of all the members as to the incriminating acts is of a decisive nature and therefore relevant.

In order to punish individual criminals which had been rejected by the majority, we do not need the definition of the criminal organization. In such individual cases, in organizations which comprise millions of members, there may be cases in which minor or even larger groups took part or just certain local districts.

I believe that it is just the major task of the Tribunal to determine with the objectivity of the judge, how this side of the guilt looks in the question of the entire guilt of the organization. I am of the opinion that the points I have mentioned, of keeping these facts secret and of the attitude of the membership after gaining knowledge of these errors and mistakes, that these are mot important points.

THE TRIBUNAL (Mr Biddle): I want to ask some questions.

THE PRESIDENT: Dr. Servatius?

MR. BIDDLE: Dr. Servatius, I would like to ask you -- and I will ask other counsel for the organizations -- whether in general you accept the definition of criminal organizations, suggested by Mr. Jackson, which is found on pages 19 and 20 of his statement? You willremember that he made five general tests. Now, in order to determine what evidence should be taken, we must determine what is relevant. Now, the test of what is relevant depends on a general definition of what is common to all organizations, for that purpose. Now, do you or could you now say whether in a general way you accept those tests for the taking of evidence?

DR. SERVATIUS: I have not thought about it and neither have I had a chance to speak to my colleagues about it. I should be grateful if we would be given, at a later date, an opportunity to speak about this. If possible, this afternoon, a representative of the defense counsel for the organizations would like to speak to the Court about this.

MR. BIDDLE: Let me ask you another question. What, in your mind, are the tests that should be applied for the purpose of taking evidence?

MR. BIDDLE: I have said that Mr. Justice Jackson had suggested a definition from which the relevancy of certain evidence could be established. Now,

H0074 - 0016

have you got any suggestion to offer for that same purpose?

DR. SERVATIUS: I would not like to make a statement without having spoken to my colleagues. It is a question of great importance which I should not like to decide now all by myself.

MR. BIDDLE: The basis of this entire argument, the very purpose of the argument was to develop that.

DR. KUBUSCHOK (Counsel for the Reichs Government): In the course of the debate of yesterday, the question has been brought up whether the task given to the Tribunal by the Charter, can be considered as a legislative act. The question has been brought up whether if we consider this to be answere by "yes", the Court has the possibility, which we have in the National Court, has to make a decision according to Law No. 10, whether definite instructions can be given to these National Courts. That concerns, first of all, the extent of the examination of the guilt of the individual member and the limitation of punishment for minor cases. I believe that if we follow this thought, that from a play of words, we would come into a lab yrinth in the practical application. It is no new thought in law, and the National Court in subsequent trials is bound by the previous decision of this Tribunal. Such cases are, of course, legally admissible. If otherwise in jurisprudence the Court is bound by a previous decision, say of an administrative court, we consider these cases quite in order and natural. Likewise, a penal court could, for instance, be bound in judging the case of fraud, to wait for the previous decision of the civil court, whether in the object of the crime there was the question of property of somebody else.

Here, nobody would think that the civil judge was doing the act of legislation. The thought that a penal court is bound by a previous decision of another court as a precedent forthe judgment, does now mean by any means that the legislative task of the author of the penal code has not been completed and has to be done by the court giving the previous decision. In my opinion, we do not have to consider this point any further because Article 9, paragraph 1 of the Charter demands of the Tribunal a clear and unlimited decision about the question whether the organization is criminal or not.

H0074-0017

A further interpretation may neither be seen in the Charter nor in the Law No. 10. Sir David spoke yesterday about the five points which, for the judgement, which I had formulated for the decision about each material, would be relevant, and he objected with regard to the two last points, that they would belong in subsequent trials according to Law No. 10; the question of the reason to exclude from guilt, individuals, is delusion under pressure or under coercion, and so on. I would like to avoid repetition and I would like to point out only the following: It is quite correct that the question of coercion and delusion and other personal reasons to exclude an individual from guilt should be discussed in subsequent trials. In connection with this, Sir David has also called the attention of the Court to a really remarkable problem and that is the problem of an illusion created by the State, by the Government. That is the problem of mass psychology in deception. This is a really important problem. It affects many many problems concerning their membership but there are far-reaching consequences for the entire membership and for the entire character of the organization.

We have to pay particular attention, therefore, to the fact how the problem of deception on the part of the State affected the membership and thereby was a characteristic for the nature of that organization -- or created a characteristic of the nature of the organization. All personal reasons to exclude someone from guilt are, therefore, to be examined by the Tribunal in judging the question of the character of the organization. Furthermore, the evidence in every case has to be on the broadest basis -- presented on the broadest basis. If the Tribunal would make any limitation now, there would be the possibility apparently that later at the end of the trial, contract to its opinion now, material which would be excluded from admission now could be considered relevant.

In the debate of yesterday, the importance of the question was discussed, what should be done with regard to the verdict, which has been demanded, about the knowledge of the individual of the character of an organization. Sir David has applied the measure of a normal thinking person, of a normal human being, and anybody who was below that level would be considered subjectively guilty.

H0074 - 0018

I have said before that in laws where such severe punishment and penalties, as in this case, and in all their penal subjects, a full consideration is requested, is demanded, to establish a norm of penalty for the field of negligence, or given an exception, and only when there are minor penalties. In every case, in the case of negligence, it must be clear to the person committing the crime, that he is supposed to submit to an examination, Law No. 10 having connection with it, the verdict demanded of this Court establishes -- represents the establishment of a norm subsequently.

If we leave the general principal Nulla Peona Sine Lege (No punishment without Law), if we leave that in the case of the main defendants, and if the reason is given that they themselves did not believe in that sentence and follow it and, therefore, cannot claim it for themselves, that does not apply to the organization. Independently of the fact whether this argument can be accepted at all in each case, even for the considering for the moment of negligence, we cannot overlook that again and again there exists a duty and necessity to examine all evidence and this is a different one in non-existing laws than it is in existing laws.

In this connection, I should like to point out also the question whether the statutes and charters of the Party organization were illegal or not; that is a question, also, during the time of the WeimarRepublic that has been considered and brought up and discussed frequently. Political problems were definitely in favor of such a decision. Apparently, legal considerations at that time made it impossible and made it not opportune to make any declarations of that kind. What measure should we then apply concerning the judgability of an individual member of an organization if the legal problem is such is so difficult and in need of interpretation?

The Prosecution has limited the accusation against the secretarial personnel of the Gestapo. The reason can only have been that in the case of these members, this objective knowledge could not be considered necessary. I should like to ask, to draw conclusions from this individual case to members of other organizations. Should the individual member of an organization which comprises millions which, of course, was in a much lesser connection with organs of the executive than a technical administrative member of the Gestapo, should not this member be judged much better subjectively than that group which was excepted?

H0074 - 0019

Do we not have particularly the obligation now, by the best possible methods, to get certainty about knowledge or non-knowledge of the individual member? Sir David, in discussing the problem of negligence, mentioned an ostrich policy all of a sudden. Well, we have to consider that the person who sticks his head in the sand does not want to see, but that person must have seen something, in fact, and therefore must not want to see any more. Another member is in an entirely different category if from the sources which are at his disposal he has knowledge about individual actions, but has no knowledge --

THE PRESIDENT: Forgive my interrupting you, but the Tribunal has already heard and listened with attention to your interesting argument, and the argument that they are now prepared to listen to is only a very short argument in rebuttal. As I have already pointed out, is seems to me that the greater part of what you are now saying is what you have already said. We can not go on hearing these arguments at great length.

DR. KUBUSCHOK: Since I have arrived at the end of my general remarks, I should like to speak about an attitude or opinion that concerns the defense of the Reichsregierung. The number of members of the Reichsregierung is a very limited one. One half is in the defendant's dock. Is it really necessary to consider the other half cumulatively as part of the organization, as the small number of those affected makes possible an individual trial, with all the legal guarantees given therein. Insofar I should like to add to the remarks made by my colleague, Dr. Laternser, who mentioned the point of the Charter that the Tribunal is not compelled to determine but that for reasons of opportunity, it does not have to do so.

THE PRESIDENT: Mr. Biddle wants to ask you some questions.

THE TRIBUNAL(Mr. Biddle): I have just one question. Will you listen to this very carefully?

If the Tribunal find that an organization was being used for criminal purpose, and certainly, with respect to some organizations, there is ample evidence that might justify such a finding, why, then, would the Tribunal no be justified in holding that organization as a criminal organization insofar as it was composed of persons who had knowledge that it was being so used and voluntarily remained members of the organization? In other words,

H0074 - 0020

the definition would state that it consisted of members who had actual knowledge that the organization was engaged in the commission of crime.

DR. KUBUSCHOK: The organization can not be separated from the total number of its members. The verdict, in connection with Law Number Ten, will have an affect for each individual member. The task of the Tribunal would not be completed if it would limit that task and would separate individuals, whom we will not now define personally, from the organization. In the task which I have mentioned, we can not overlook the practical purpose, and we do not consider that if such a limitation is made.

THE TRIBUNAL (Mr. Biddle): I will ask one more question. I do not think you have answered my question. I will put it very simply again.

How would that definition be unfair to any individual?

DR. KUBUSCHOK: If a limited circle of persons in connection with the organization would be branded as criminal, consequently, there would be an injustice to the other members who have also participated in the organization. That declaration, of course, affects the name of the entire organization, and, therefore, the consequences of discrimination will affect each individual member, even if in limiting the definition it will have been excepted.

THE PRESIDENT: I think we had better adjourn for ten minutes.

(A recess was taken.)

H0074-0021

DOCTOR LATERNSER (Counsel for the General Staff and the OKW): Mr. President, it was not my intention to make further statements today about the concept of the criminal organizations because I believed that my statements of yesterday had been comprehensive. The second question put by Mr. Biddle to my colleague, Kubuschok, I would like to give my opinion on this question.

Question No. 2, if I understood it correctly, was to the effect as to why it is not proper as far as individuals are concerned who were members of an organization, or why can it be improper towards some individuals who were members of an organization if this organization is declared criminal. It is improper for those members who, as far as aims and purposes are concerned, if they were criminal, if they did not know about them. We must--

THE TRIBUNAL (Mr. Biddle): To save time, the question was a very simple one. I will repeat it again. I said this: If an organization was being used for ciminal purposes,- and I added that there was very great evidence that such was the case in certain instances, - why would it not be proper to hold it as a criminal organization in so far as it was composed of persons who had knowledge that it was being so used and voluntarily remained members? Of course, that would exclude from the organization everybody who didn't have knowledge that it was engaged in criminal purposes.

DOCTOR LATERNSER: Yes, that is correct. I did not understand the question. Then the matter has been settled to our satisfaction.

DOCTOR LOEFFLER (Counsel for the SA): I would like to correct a misunderstanding. Sir David yesterday in his rebuttal said that I admitted that the SA on the 10th of November, 1938, was participating and I emphasized that I stated that only two per cent of the SA at the most were participating in special actions and it is taken for granted that this incident is included. I have cause with this example to emphasize those matters which my colleague mentioned just a little while ago regarding the taking into consideration of the mistake of an organization because some things cannot be prevented; that an organization will deviate from its purpose and make a mistake; that ninety per cent of those people who participated would have to be included with the two per cent who were active but were dismayed at this action. They were spiritually against it, Spiritually they were not in agreement with it.

H0074 - 0022

DOCTOR LATERNSER (Counsel for the General Staff and the OKW): Mr. President, it was not my intention to make further statements today about the concept of the criminal organizations because I believed that my statements of yesterday had been comprehensive. The second question put by Mr. Biddle to my colleague, Kubuschok, I would like to give my opinion on this question.

Question No. 2, if I understood it correctly, was to the effect as to why it is not proper as far as individuals are concerned who were members of an organization, or why can it be improper towards some individuals who were members of an organization if this organization is declared criminal. It is improper for those members who, as far as aims and purposes are concerned, if they were criminal, if they did not know about them. We must--

THE TIRBUNAL (Mr. Biddle): To save time, the question was a very simple one. I will repeat it again. I said this: If an organization was being used for ciminal purposes,- and I added that there was very great evidence that such was the case in certain instances, - why would it not be proper to hold it as a criminal organization in so far as it was composed of persons who had knowledge that it was being so used and voluntarily remained members? Of course, that would exclude from the organization everybody who didn't have knowledge that it was engaged in criminal purposes.

DOCTOR LATERNSER: Yes, that is correct. I did not understand the question. Then the matter has been settled to our satisfaction.

DOCTOR LOEFFLER (Counsel for the SA): I would like to correct a misunderstanding. Sir David yesterday in his rebuttal said that I admitted that the SA on the 10th of November, 1939, was participating and I emphasized that I stated that only two per cent of the SA at the most were participating in special actions and it is taken for granted that this incident is included. I have cause with this example to emphasize those matters which my colleague mentioned just a little while ago regarding the taking into consideration of the mistake of an organization because some things cannot be prevented; that an organization will deviate from its purpose and make a mistake; that ninety per cent of those people who participated would have to be included with the two per cent who were active but were dismayed at this action. They were spiritually against it, Spiritually they were not in agreement with it.

It is, therefore, a mistake on the part of the Prosecution if from this single exception general conclusions are drawn as to the general character of the organization, and we can object rightfully to such a thing, that it was an exception of the general tendency of the organization.

Then, the SA was supposed to have been connected with concerntration camps, but that is a typical proof for some mistakes that we can make when we deal with organizations. Out of four millions, perhaps one thousand men; that is a very small percentage. The rest of the 3,999,000 had no knowledge, and this may be proved. No one would wish to claim from the fact that .005 per cent were used, whereas the other people had no knowledge, we can draw a conclusion as far as the criminal character is concerned. The question which was raised at this point is not answered with the small percentage, but we are before and after on the point that the declaration which was made by Attorney Kubuschok, as far as the criminal character is concerned, as shown by the Prosecution, if these hypotheses are met as shown by Kubuschok, and they agree with the other colleagues that are defending these organizations, then this point may answer further questions.

In regard to the question which Justice Biddle put to the defendants or the counsel for the various organizations, I would like to emphasize that yesterday Mr. Justice Jackson made the suggestion that the witnesses should not be questioned but to call in experts for the testimony and to use that evidence. With emphasis I would like to oppose this suggestion. Experts cannot be heard who can tell what had taken place and it is impossible for a witness to show what knowledge the various members had. The members, as far as the question of the knowledge of a criminal character, vary. There are intelligent, average, and less intelligent members of the organization. Then, if a judgment is to be drawn on the testimony of the lesser intelligent members, this judgment which is to condemn people, we feel that we cannot depend on such a judgment because intelligence has to be considered; and it would be an injustice for the average be taken as a basis, for the average would be an injustice for all those who are less intelligent, which would be included in this judgment.

As a conclusion I would like to point out that the debate of yesterday about the question of the effect of the judgment of the decisions which will be given by the Tribunal and in confirming our

H0074-0023

H0074-0024

expectancies, Mr. Justice Jackson declared that the decision would be in the nature of a statement or declaration, but this contradicts what General Clay, the Military Governor of the American occupation, said yesterday. The statement that he had made in an interview to the "Neue Zeitung", the American paper for the German people -- I would like to quote a sentence from the very latest edition which would contradict the opinion of Justice Jackson:

Clay declares as to the question of the fate of the people in the United States zone of occupation, the people who are interned in that zone:

"The decision of the Nurnberg Tribunal will decide what will happen to them. Their number is at present 280,000 to 300,000. Should the International Tribunal at Nurnberg condemn all people who are included in the Indictment and consider them as war criminals, then the number will range up to 500,000 or 600,000."

The declaration made by Justice Jackson that no massretribution is intended and could only say that the present attitude of his would reflect the present attitude of his Government, but there was no assurance that other Governments would have another attitude or would assume another attitude. But Jackson's Government is not bound to Jackson's point of view and may change their point of view.

I would like to conclude with this remark: Justice Jackson mentioned the shock which results with the present condition -- that is, the Charter in connection with the desired decision by the Defense -- and that it is to be in connection with Law No. 10 and the effect that it has made on the Prosecution -- this result of shock will not be concerned with the defense alone but all people who are interested in justice and who have justice at heart, millions of members of organizations will be involved. Justice Jackson was concerned with the fact that there might be innocent people connected with it and that they could be brought to justice before the national courts and that a penal code could be applied, that is, money, sentences up until the death sentence could be applied, and that the defense would point out that the Prosecution might deviate from the legal basis and might go into the arbitrary.

H0074-0025

If Justice Jackson is concerned with the shock effect of the death of many Jews, those things happened outside the law and in the name of power, and this Tribunal is interested in outlining power and to put in justice in its place. But justice must be clear and it must be sure.

SIR DAVID MAXWELL-FYFE: The Tribunal said earlier that certain questions had been asked of me. I am perfectly prepared to answer the three questions if the Tribunal desires their time to be occupied by my so doing.

THE PRESIDENT: I don't think the Tribunal wishes to hear any further arguments unless you particularly want to answer anything.

SIR DAVID MAXWELL-FYFE: I did not intend to argue at all. It was only that Dr. Dix put two questions on which he asked my view, and Dr. Servatius one, but I am in the hands of the Tribunal. I do not want it to be thought that the Prosecution is not prepared to answer the questions.

THE PRESIDENT: If you can answer them shortly, we should be quite glad to hear them.

SIR DAVID MAXWELL-FYFE: The first question that Dr. Dix asked me was to clarify what I had said about the Fuehrerprinzip in relation to the Reichsregierung. I can answer that in two sentences. I said that in addition to the ordinary support which members of the Reichsregierung in 1933 gave to Hitler under the Fuehrerprinzip, they entrusted their consciences and wills to him and adopted completely his points of view.

In order that Dr. Dix may be under no misapprehension with regard to his grant, the case for the Prosecution may be put in the words of Dr. Goebbels, one of the conspirators, on the 21st of November 1934, in a conversation with Dr. Schacht.

"I assured myself that he absolutely represents our point of view. He is one of the few who accepts the Fuehrer's position entirely."

The second point was on the question of the Party Program in relation to the Treaty of Versailles and the Anschluss. Dr. Dix asked me to deal with those who desired to effect the aims of the Party program in a peaceful way. The Prosecution says that that does not arise: that the Party program must be considered in the background of Hitler and other publications as to the use of force and also as to the existing state of things in the

H0074 - 0026

relationship of Germany with the Western powers and also a treaty of obligation to Austria and Czechoslovakia.

The third question that was put to me was by Dr. Servatius about the Leadership Corps. You will remember, my Lord, that in the statement of the Tribunal the Prosecution was asked, if they were making any limitation, to make it now. That is contained in the statement of the Tribunal. The limitation which we have made, that is only including the staff in the case of Reichsleitung, Gauleitung, and Kreisleitung, and excluding the staff in the case of the Ortsgruppenleiter, Zellenleiter, and Blockleiter, is the view to which the Prosecution adheres and which has been agreed by the different delegations. I wanted Dr. Servatius to know that that was the position. I do not intend to repeat the reasons for it which were given by my friend, Mr. Justice Jackson.

THE PRESIDENT: There is only one thing I should like to say. I think it might be useful to the Tribunal, if you have them, to let us have copies of the British statutes to which Mr. Justice Jackson referred and also the certified judgments of the German courts--if you have copies available.

SIR DAVID MAXWELL FYFE: They will be found for the Tribunal and the Tribunal will receive them within the shortest possible time.

THE PRESIDENT: Mr. Dodd, I understand that you have an affidavit--

MR. DODD: Yes.

THE PRESIDENT: -- which you wish to put in with reference to the High Command?

MR. DODD: Yes, we do have it. We located this affidavit on Thursday, the Tribunal had inquired about it on the afternoon of the day before, on Wednesday, I believe it was. We have prepared for the Tribunal a list of the offices comprising the German General Staff and High Command as defined by the Indictment in Appendix "B". The list was compiled from official sources in the Admiralty Office of Great Britain, the War Office of Great Britain, and the Air Ministry of Great Britain, and supplemental information was obtained from senior German officers, now prisoners of war in England and in Germany. The list is attached to this affidavit as we intended to submit it this morning to the Tribunal, and the affidavit

H0074-0027

describes the source from which this information was obtained and it points out that the list does not purport to be exhaustive or necessarily correct in every detail. It is, however, substantially a complete list of the members of the General Staff and of the High Command and of the High Command Group, and on the basis of this compilation there appear to have been a total of 131 members, of whom 114 are thought to be living at the present time. I wish to offer the list formally, together with this affidavit as United States Exhibit No. 778. I ask that it be accepted without it being read. However, of course, if the Tribunal would like it read over the public address system, I should be glad to do so.

THE PRESIDENT: No, I don't think you need read it.

MR. DODD: I might say to the Tribunal that copies --

THE PRESIDENT: Copies have been given to the defense.

MR. DODD: Yes, they have, your Honor. They have been given to the defense.

THE PRESIDENT: Very well. Thank you.

MR. DODD: Colonel Smirnov, Your Honor, is prepared to read the document with reference to Stalag Luft 3. If the Tribunal would like, we will have him do so.

THE PRESIDENT: I think perhaps we will have him do that on Monday morning.

MR. DODD: Very well.

THE PRESIDENT: The Tribunal will now adjourn.

(The Tribunal adjourned until 4 March 1946 at 1000 hours.)